

Water Quality Standards Advisory Committee

Legislative Study Working Groups

MEETING MINUTES

Monday, June 14, 2010 9:30 am – 12:30 pm
NH Fish and Game Department
East Conference Room
11 Hazen Drive, Concord, NH

Attendees

NAME	ORGANIZATION
PETER H RICE	CITY OF PORTSMOUTH
KENNETH R RHODES	CLD CONSULTING ENGINEERS, INC
JOHN HODSDON	FARM BUREAU
HEIDI KROLL	GALLAGHER, CALLAHAN, & GARTRELL
LARRY E MORSE	GZA
TYLER PHILLIPS	HORIZONS ENGINEERING, PLLC
SCOTT DECKER	NEW HAMPSHIRE FISH AND GAME DEPARTMENT
BOB BALL	NH ASSOCIATION OF CONSERVATION COMMISSIONS
ANDY CHAPMAN	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
BRANDON KERNEN	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
GREGG G COMSTOCK	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
JACQUIE COLBURN	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
JEFF ANDREWS	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
JILLIAN E MCCARTHY	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
KEN J EDWARDSON	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
PHIL TROWBRIDGE	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
SARAH PILLSBURY	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
TED WALSH	NH DEPARTMENT OF ENVIRONMENTAL SERVICES
JIM MCCLAMMER	NH HOUSE
JUDITH T SPANG	NH HOUSE
LAWRENCE M KAPPLER	NH HOUSE
JOEL ANDERSON	NH HOUSE STAFF
SUSAN OLSEN	NH MUNICIPAL ASSOCIATION
JASEN STOCK	NH TIMBERLAND OWNERS ASSOCIATION
PAUL M CURRIER	NHDES WATERSHED BUREAU
JOHN BOISVERT	PENNICHUCK WATER
DONALD L WARE	PENNICHUCK WATER WORKS
MICHAEL B METCALF	UNDERWOOD ENGINEERS, INC
JIM FITCH	WOODARD & CURRAN INC

Enforcement Working Group

Issues Discussed

DES proposed that HB 1348, which clarified enforcement authority, be deemed ITL (“inexpedient to legislate”). DES already has clear enforcement authority over both point and non-point sources in RSA 485-A:22. The language in HB 1348 provided some clarification but no change in actual authority. Given that HB 1348 would not make any substantive changes, DES determined that the changes were not necessary.

Motions Adopted

Larry Morse proposed, and Mike Kappler seconded, the following motion:

- To recommend that HB 1348 be deemed ITL because DES already has enforcement authority in RSA 485-A:22.

The motion was approved by voice vote without opposition.

Action Items

- None

Antidegradation Working Group

Issues Discussed

Representatives from DES, NH Association of Natural Resource Scientists, Associated General Contractors, Water Works Association, and Timberland Owners Association proposed a shorter version of the statutory language related to antidegradation. The shorter version (see Motions Adopted section below) simplifies the language and is consistent with the federal requirement. Paul Currier explained that when DES was proposing to adopt antidegradation in the Alteration of Terrain Program rules, people expressed concern that DES did not have statutory authority to adopt antidegradation rules. Either option, the language originally proposed in HB 1305 or the shorter version proposed at today’s meeting, would give the statutory authority to implement the existing antidegradation rules in Env-Wq 1708.

Workgroup members discussed that the shorter version would allow DES to satisfy the requirements of the federal Clean Water Act and still leave DES with flexibility to first work out the classification system and then determine antidegradation implementation. It was also discussed that it is better to keep antidegradation language in rule because it provides DES with greater flexibility for such a complex topic.

It was suggested that DES cite 40 CFR 131 instead of 40 CFR 131.12 in case the federal numbering changes. The workgroup suggested consulting the legislative staff for guidance on how to reference the federal regulation.

Motions Adopted

Mike Kappler proposed, and Larry Morse seconded, the following motion:

- To adopt the shorter version of the statutory language related to antidegradation (“The department shall adopt rules that implement the antidegradation provisions of the federal Clean Water Act as required under 40 CFR section 131.12.”)

The motion was approved by voice vote without opposition.

Action Items

- None

Surface Water Definitions Working Group

Issues Discussed

The group discussed the latest DES proposals for definitions of “waters of the state”, “tidal waters”, “fresh waters”, “wetlands”, and “surface waters.” For fresh waters, there was concern that the phrase “during any season of the year” implied a duration that would be ambiguous. The group decided that this phrase should be deleted to make the definition exactly match the definition in RSA 482-A. Another concern regarding the “fresh water” definition was that it could include groundwater (groundwater is fresh and it flows). The group appended “excluding groundwater” to the definition to eliminate this confusion.

The surface water definition was shortened by removing illustrative language (“but not limited to rivers, streams, lakes, ponds, impoundments, tidal waters”). The concern was that this list might be construed as an exclusive list of waterbody types applicable to surface waters. However, it was decided to retain the illustrative language regarding wetlands (“and wetlands with standing or flowing water”) for clarity.

For the wetlands definition, the wetlands for which water quality standards will apply will be limited to those wetlands that are considered waters of the United States under the Clean Water Act. This definition is less inclusive than the state definition in RSA 482-A. It also excludes man-made treatment systems per 40 CFR 230.3(s). The new definition in RSA 485-A will not limit the implementation of dredge and fill rules under RSA 482-A. The group discussed which agency would be responsible for determining “significant nexus” for wetlands to be considered waters of the United States. It was agreed that responsibility for these determinations resided with the Army Corps. Applicants can file an application with the Army Corps for Jurisdictional Determination if they want. One unresolved question was whether man-made mitigation wetlands should be subject to the water quality standards.

The group asked DES to research whether changing the definitions of surface waters and wetlands would affect setback requirements for subsurface systems.

Motions Adopted

Ken Rhodes proposed, and Mike Kappler seconded, the following motion:

- To adopt the following definition of fresh waters: “Fresh waters means wherever fresh water flows or stands, excluding groundwater.”

The motion was approved by voice vote without opposition.

Judith Spang proposed the following motion:

- To adopt the following definition of surface waters: “Surface waters means fresh waters and tidal waters, including wetlands with standing or flowing water.”

The motion was approved by voice vote without opposition.

Ken Rhodes proposed, and Jim McClammer seconded, the following motion:

- To adopt the definition of wetlands proposed by DES staff (“Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, and are waters of the United States under the federal Clean Water Act.”)

The motion was approved by voice vote without opposition.

Action Items

- DES will check for conflicts or problems with subsurface system setbacks due to the new definitions of surface waters and wetlands.
- Consult with DES Wetlands Bureau regarding the final, proposed definitions.

Designated Uses Working Group

Issues Discussed

Rep. Spang, Chairperson of the Working Group, opened the discussion and indicated that she liked the designated use classification system that California had developed. Paul Currier said that we need to keep in mind that the designated uses (DU) should reflect the uses and values that we want our waterbodies to support; DES will identify all of the waters in NH and what designated uses they should support. Each assessment unit (AU) will be assigned a DU, then tiers or levels of use can be added. Paul used the swimming DU as an example: for existing swimming beaches there will be a higher set of criteria than there will be for a waterbody because we expect that swimming will be a frequent use at the beach, as opposed to swimming which will probably be an occasional use in the waterbody.

Paul explained the phasing of this effort and the need to work closely with EPA because they will not allow for the removal of a DU without first conducting a “use attainability analysis”. However, it is more likely that NH will be adding not removing DUs. Paul said that we will need to develop a process for assigning DUs and tiers, map and assign the DUs to the AUs and then solicit public input; this should be done before a new system is adopted.

Rep. Spang thanked Paul for developing and outlining the phasing of this effort. Jim Fitch asked that with the proposed classification system, would a change to the DU classification mean that it has to be done through legislation. Paul said we can assign criteria to existing AUs, for the most part, yes. There will be a generic class assignment but they will be adjusted as information becomes available and/or with public input. Rep.

Spang asked if DES will assign the DUs and the public will offer pros and cons. Paul said that DES will make recommendations for the entire State after a public information process similar to what the department did for the NH Water Resources Plan. Rep. Spang recommended that DES should establish the water quality parameters for each use to make it as equitable as possible. Paul replied that DES will make assignments to the maps and it will indicate the criteria that would apply; DES will establish the algorithms to establish the classifications and that the department will work within the context of the water quality standards, with the input of the working group and the RR&D committee to develop a report.

Tyler Phillips asked if we are locking in the water quality standards that exist at the time and do the stakeholders understand the process? Rep. Spang added to what extent are we establishing current versus potential future uses. Paul responded that these are goal uses. Jim Fitch said that this will allow us to determine where we want future uses to be. Jasen Stock asked if this process will drive the need for continuity among AUs on rivers; will it promote the need for Total Maximum Daily Loads (TMDLs).

John Hodsdon said that he would like to talk about specific DUs, including such things as his irrigation pond, which is not currently included as a DU. Paul said that the irrigation pond is a good example of how a DU, such as agricultural uses, including irrigation ponds can fit into the matrix. Rep. Spang questioned whether some uses should be subject to the community's determination because they are the State's responsibility. Rep. McClammer added that decisions pertaining to, for example, rare, threatened or endangered species should not be subject to public change. Ken Rhodes said that getting away from classes and moving toward uses makes sense, however, can we assign where we want rare, threatened and endangered species to be? The question as to where anti-degradation fits into the classification system was asked. Paul responded that anti-degradation applies to all criteria. Ken then asked how we would account for conflicting uses. Paul provided a couple of examples including an irrigation pond and said that it should not be assigned the drinking water supply DU.

Larry Morse asked if the group wants to pursue this new classification system and Rep. Spang asked if everyone was in favor of continuing to develop a new classification system, by a show of hands, all present agreed. Jasen Stock then asked who would have the responsibility of meeting the DUs, for example, would an upstream riparian owner need to meet the downstream DUs. Paul responded that there is a collective obligation to meet the water quality standards now and that DES has the enforcement authority. Presently, if an impairment is identified, then a TMDL is undertaken to determine how to correct it and who is responsible.

Rep. Spang pointed out that the proposed geomorphic integrity DU wasn't discussed and Rep. McClammer suggested that this proposed DU along with several others be discussed as the group moves ahead with the process.

Motions Adopted

Jim McClammer proposed, and Mike Kappler seconded, the following motion:

- To strike the language pertaining to designated uses from HB 1305.
- The motion was approved by voice vote without opposition.

Action Items

- At the June 22nd meeting of the Working Group, DES will present proposed legislative language calling for the development of a new classification system.
- DES will also do a PowerPoint presentation further outlining the proposed new classification system.

Discuss logistics for full WQSAC meeting on 6/22/10

The group confirmed that the next meeting will with the full WQSAC on June 22, 2010 from 1:30 to 4:30 pm. The meeting will be held at the DES offices in Concord. Each working group will report out their recommendations to the full committee.